No. 80-15
(Consolidated with No. 80-11)

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMOCO PRODUCTION COMPANY and
MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, and CECIL ANDRUS, Secretary of the Interior,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Jicarilla Apache Tribe has power to tax severance of oil and gas from its Executive Order Indian reservation by non-Indian lessees.

2. Whether overriding national interests expressed in the congressional grant to the states of the power to tax

oil and gas production from reservation lands are frustrated by tribal taxation of the same production.

3. Whether a power to tax founded upon the power to exclude non-members or attach conditions to their entry includes the power to impose a new tribal severance tax on mineral lessees.

4. Whether the Indian and Interstate Commerce Clause of the Constitution bars a tribal tax upon severance from reservation lands of oil and gas, most of which is delivered into interstate commerce:

a. As discriminating against interstate commerce, where the tax applies only to oil and gas "sold or transported off the Reservation,"

b. As burdening interstate commerce itself, where the tax applies only after the oil and gas have been placed in transit beyond the Reservation's borders and into interstate commerce, or

c. As imposing a multiple burden upon interstate commerce, where the state in which the Reservation is located taxes the same activity.*

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* *List of other parties.* The only other parties not listed in the caption are petitioners in No. 80-11 consolidated with this case. They are: J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, Jerome T. McHugh, Chase Oil Company, Dugan Production Corporation, Consolidated Oil and Gas, Inc., Southland Royalty Company, Tesoro Petroleum Corporation, Amerada Hess Corporation, Supron Energy Corporation, Energy Reserves Group, Inc., J. M. Huber Corporation, Continental Oil Company (now Conoco Inc.), Atlantic Richfield Company, Phillips Petroleum Company, Tenneco Oil Company, Getty Oil Company, Gulf Oil Corporation, Mobil Oil Corporation and Oxy Petroleum, Inc.

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OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals appears at pp. 139-97 of the Joint Appendix (J.A.), and is reported at 617 F.2d 537. The Order of the Court of Appeals amending its Opinion and denying a Petition for Rehearing appears at J.A. 199-202. No opinion was rendered by the United States District Court for the District of New Mexico. That Court's Findings of Fact and Conclusions of Law appear at J.A. 127-33, and its Judgment appears at J.A. 135.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Court of Appeals was entered on February 22, 1980. A timely petition for rehearing filed by the Petitioners in No. 80-11 was denied, and the Opinion was amended by the insertion of a new page 6, on April 25, 1980. By Orders dated May 9, 1980 and June 12, 1980, the time of Petitioners Amoco and Marathon to file their petition in No. 80-15 was extended to and including July 5, 1980. The petition in No. 80-11 was filed on July 3, 1980, and the petition in No. 80-15 was filed on July 5, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISION, TREATY, STATUTES, ORDINANCES AND EXECUTIVE ORDERS INVOLVED

The constitutional provision involved is the Interstate and Indian Commerce Clause, art. I, § 8, cl. 3 (App. 1a).[1] The treaty involved is the Treaty of Guadalupe Hidalgo Between the United States and Mexico, 9 Stat. 922 (1848) (App. 1a-3a). The statutory provisions involved are the Act of March 3, 1927, 25 U.S.C. §§ 398a-e (1976) (App. at 3a-7a); Sections 16 and 17 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§ 476-77 (1976) (App. 7a-9a); and the General Leasing Act of May 11, 1938, 25 U.S.C. §§ 396a-f (1976) (App. 9a-12a).

[1] This and similar references are to the Appendix to this brief.

This case also involves Article XI, Section 1, ¶¶ (a) (3) and (e) of the Revised Constitution of the Jicarilla Apache Tribe (App. 12a-13a); the Jicarilla Apache Tribe Oil and Gas Severance Tax Ordinance and accompanying instructions (App. 13a-19a), and Executive Orders relating to the Jicarilla Apache Reservation (App. 20a-24a).

STATEMENT OF THE CASE

This action was commenced in the United States District Court for the District of New Mexico on June 14, 1977 by these Petitioners filing a complaint praying for a judgment declaring that a severance tax imposed by the Jicarilla Apache Tribe ("the Tribe") on the production of oil and gas on the Jicarilla Apache Reservation was unlawful and for an injunction against the collection of the tax (J.A. 43). A similar action was filed by the Petitioners in No. 80-11 (J.A. 1). Following a non-jury trial, the Court on December 29, 1977, entered findings of fact and conclusions of law and entered a judgment holding that the tax was unlawful and enjoining its enforcement (J.A. 127-35). On appeal, the judgment was reversed by a divided United States Court of Appeals for the Tenth Circuit sitting en banc. 617 F.2d 537 (J.A. 139-97). This Court granted certiorari on October 6, 1980, and consolidated the cases.

The Tribe resides in an area in Northwestern New Mexico that was ceded to the United States by the Treaty of Guadalupe Hidalgo (App. 1a) in 1848, after the Mexican-American War. The Tribe was not recognized in the Treaty as a sovereign entity or mentioned in any other way. The lands occupied by the Tribe were made into a reservation by Executive Order (App. 20a-24a). The Tribe is organized under the Indian Reorganization Act of 1934. It is undisputed that no treaty or act of Congress has ever provided expressly that the Tribe has any power to impose taxes of any kind upon non-Indians (J.A. 145).

Petitioners are engaged in the extraction of oil and gas from the Tribe's reservation lands under various leases issued by the Tribal Council and approved by the Secretary of the Interior (J.A. 129, 141). Approximately 80% of the oil and gas extracted from the Reservation is delivered at the well-head into interstate pipelines for shipment and sale outside the State of New Mexico (J.A. 129, 143). All the leases were issued prior to enactment of the Tribal Severance Tax Ordinance in 1976. The leases provide for the payment of royalties to the Tribe, specify that no change may be made in the rate of "royalty or annual rental" without the written consent of both parties, and contain no provision expressly reserving to the Tribe any power to impose taxes upon the lessees (J.A. 27).

Pursuant to authority granted in 1927 (25 U.S.C. § 398c (1976)), the State of New Mexico has taxed the production of oil and gas from the Tribe's Reservation since 1937 and collects such taxes from Petitioners.[2]

In 1968, the Tribe adopted a Revised Constitution authorizing the Tribal Council to adopt ordinances imposing taxes and fees on non-members of the Tribe doing business on the Reservation (J.A. 129, 142; App. 12a). In 1976, the Tribal Council adopted an ordinance entitled "Oil and Gas Severance Tax" imposing a tax on "any oil and natural gas severed, saved, and removed from Tribal lands" (J.A. 129, 143; App. 13a). The Revised Constitution and the Ordinance imposing the tax were approved by the Secretary of the Interior, through his delegates (J.A. 129, 143). The Ordinance and the instructions mailed to lessees specified that the tax applied only to oil or gas "sold or transported off the Reservation" (J.A. 130, 143; App. 13a-19a). The Ordinance also expressly consented to the jurisdiction of the United

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[2] *See* N. M. Stat. Ann. §§ 7-29-1 to 7-29-22; §§ 7-30-1 to 7-30-26; §§ 7-31-1 to 7-31-25; §§ 7-34-1 to 7-34-20 (1978); 1937 N. M. Laws, Ch. 103.

States District Court for actions concerning the tax (App. 17a).

The suit filed by Petitioners challenging the Tribal tax invoked jurisdiction under the Fifth Amendment and 28 U.S.C. §§ 1331 and 1343(4) (1976). The District Court held the tax invalid on the following grounds: (1) neither tribal sovereignty nor the Indian Reorganization Act empowered the Tribe to enact the tax; (2) 25 U.S.C. § 398(c) (1976) grants the State of New Mexico the exclusive right to tax lessees; and (3) the tax discriminates against and is a multiple burden on interstate commerce in violation of the Commerce Clause (J.A. 131-33).[3] The Court of Appeals reversed (J.A. 139), Chief Judge Seth and Judge Barrett dissenting (J.A. 165, 176).

The Court of Appeals rejected the grounds relied on by the District Court and held: First, that the Tribe has power to impose a tax upon non-Indians for the severance of oil and gas from its Executive Order reservation lands without benefit of express authorization in a treaty (J.A. 145-52); second, that the Tribe's power to tax was not preempted by the Act of Congress (25 U.S.C. § 398c (1976)) expressly authorizing the states to tax the same activity or by the comprehensive congressional regulation of mineral leasing on Indian reservations (J.A. 157-61); and third, that the Tribe's tax did not violate the Interstate and Indian Commerce Clause either by discriminating against or imposing a multiple burden upon interstate commerce (J.A. 152-56).

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[3] Petitioners also sued the appropriate New Mexico official seeking a declaratory judgment as to the validity of the New Mexico tax in the event that the Tribal severance tax should be upheld. Since the District Court found the Tribal tax invalid, it was not necessary to consider Petitioners' claims against the State, and they were dismissed without prejudice and with leave to refile in the event that the final judgment in this case should reinstate the Tribal tax (J.A. 137). Petitioners are paying the state tax under protest and have filed statutory refund suits which are being held in abeyance pending final judgment in this case.

SUMMARY OF ARGUMENT

I. Whatever power Indian tribes may have to tax non-members rests—not on general notions of Indian sovereignty—but on the power to exclude persons from their reservations. This power to exclude was the ground used to uphold a cigarette tax on non-Indian purchasers in last term's *Colville* case.[4] But this power to exclude cannot justify the instant severance tax. The Jicarilla Tribe is not here seeking "to tax non-Indians entering the reservation to engage in economic activity." Petitioners are already on the Reservation under valid leases, approved by the Tribal Council and the Secretary of the Interior, which specifically provide that royalties may not be increased without Petitioners' consent. The tax must accordingly fall since no treaty or statute authorizes it, it is inconsistent with the Tribe's dependent status, and it cannot be rooted in any notion that the Tribe has general sovereign powers over Petitioners or any right as landowners to tax.

II. Even if the power to exclude were available, this tax still falls. As stated in *Colville*, Indian taxing power may be divested by "federal law" or by inconsistency "with the overriding interests of the National Government." The tax is divested on both of these grounds.

1. The Jicarilla tax is preempted by the Act of March 3, 1927. This Act—which settled a controversy as to whether Executive Order Indian reservations should be leased as public domain or leased for the benefit of the Indians—gave the royalty interest to the Indians and expressly gave the states the power to tax all production, including the royalty share of the Indians. In so doing, Congress was following a consistent pattern of dealing with various kinds of Indian lands, in all of which the Indians were given royalties and the states were given

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[4] *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, —— U.S. ——, 100 S. Ct. 2069 (1980), hereinafter cited as "*Colville*".

the power to tax. In accordance with this consistent Congressional policy, New Mexico and other western states have long taxed production from Indian lands without challenge or any suggestion that the Indians have any power to tax the same production.

2. This long-standing recognition that the states have the power to tax to the exclusion of the Indians is reinforced by overriding national interests which also bar the instant tax.

a. The leasing of Indian lands for oil and gas and other minerals is subject to comprehensive and detailed regulation by the federal government. Just as such pervasive federal regulation preempts state taxation of Indians under the principles of this Court's decisions in *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965); and *White Mountain Apache Tribe* v. *Bracker*, —— U.S. ——, 100 S. Ct. 2578 (1980), so should it preempt this Indian attempt to tax non-Indians.

b. The burden of the tax, and the intention to use it to control production, are contrary to our national goals of increasing domestic energy supplies and reducing our dependence on foreign sources.

III. The tax offends the Commerce Clause in three respects:

1. It discriminates against interstate commerce by taxing only oil and gas which is removed *from* and sold or transported off the Reservation. Production which remains *in*, or is sold *on* the Reservation is not taxed. Such a preference for local commerce is invalid. *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977).

2. Furthermore, the tax is imposed on the act of interstate commerce itself. It is not imposed on the act of severance, but rather is applied after the production has been placed in transit beyond the Reservation borders.

Such a tax, after transmission in commerce has begun, comes too late and cannot stand. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954).

3. Even if the foregoing defects were remedied by amending the Tribal Ordinance to make it a true severance tax, the tax would still be invalid as a multiple burden on commerce. Two "sovereigns," New Mexico and the Tribe, would be taxing the same event and neither would be required to apportion. In these circumstances, the Tribe's tax must fall, *cf. Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), since Congress has specifically authorized the New Mexico tax.

ARGUMENT

I. THE SOVEREIGN POWERS OF SELF-GOVERNMENT OF THE JICARILLA APACHE TRIBE DO NOT INCLUDE THE POWER TO TAX PRODUCTION BY MINERAL LESSEES PURSUANT TO EXISTING LEASES ON EXECUTIVE ORDER RESERVATIONS.

The decision of the Tenth Circuit upholding the Jicarilla tax as an attribute of tribal sovereignty rests upon three separate, albeit mistaken conclusions: (1) that existing authorities, including decisions of this Court, have recognized a sovereign tribal power to tax mineral production by non-member lessees on Executive Order reservations; (2) that there is "no essential difference" between a taxing power based upon the right to exclude and the one asserted by the Tribe over Petitioners who are on the Reservation pursuant to valid, existing leases; and (3) that the imposition of the Tribal tax does not implicate vital national interests.

A. *Colville's* recognition of a power to tax non-members is premised on the power to exclude which is not applicable here.

The starting point for analysis of an Indian tribe's power to tax non-members is the recent *Colville* decision. In upholding a tribal tax upon the sale of cigarettes to non-Indians within the reservation's borders, this Court made clear that the power to tax was based on the tribe's power to exclude non-members from the reservation or to attach conditions to their entry. This is the conclusion of the opinions of the Executive Branch relied upon by the Court, and summarized in 55 I.D. 14, 46 (1934):

> "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and *over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.*"

(Quoted in *Colville, supra*, 100 S. Ct. at 2081 (emphasis added)). Likewise, as this Court explained, the federal courts "have acknowledged tribal power to tax non-Indians *entering* the reservation to engage in economic activity." *Ibid* (emphasis added).[5] The Court also noted that the relevant treaties had recognized "inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter. . . ." *Id.* at 2082.

The decision in *Colville* is a reaffirmation of existing law, not a departure from it. It confirms a principle

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[5] The Executive Branch authorities and court decisions cited in *Colville* all involved permit or license fee taxes attached as a condition to entry. They also make clear that the power to exclude "intruders" from a reservation does not apply to persons "holding permits from one of these Indian tribes to reside within their limits. . . ." 17 Op. Att'y Gen. 134, 135 (1881). *See also* 18 Op. Att'y Gen. 34 (1884) (upholding the validity of such permit laws,

sometimes established expressly by treaty, and sometimes regarded as inherent: That a tribe possesses "the right . . . to control the presence within the territory assigned to it of persons *who might otherwise be regarded as intruders*, and . . . to attach conditions to the presence within its borders of persons *who might otherwise not be entitled to remain within the tribal territory.*" *Morris* v. *Hitchcock*, 194 U.S. 384, 389 (1904) (emphasis added).

The Tenth Circuit failed to perceive the true nature of the Jicarilla tax, which is vastly different from those taxes previously endorsed by this Court. Unlike the taxes upheld in *Colville* and in *Morris* v. *Hitchcock*, the Jicarilla tax cannot be justified as an exercise of the Tribe's power to exclude. The crucial distinction here is that the Tribe seeks to impose a tax after entry upon the Reservation has been made pursuant to leases on specified terms (including payment of bonus, rental, and royalties) negotiated and mutually accepted by the parties which cannot be changed without the consent of the lessees (J.A. 27). The impact of the tax here is not optional; Petitioners have already made substantial commitments which they may not avoid simply by remaining outside the Reservation, as could the cigarette buyers in *Colville* and the cattle owners in *Morris*.[6] The Tribe is not

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noting that a treaty provision which denied the Tribe the power to govern non-members or their property did not affect the right to impose a permit tax, as the permit tax was based on exercise of the power to exclude or attach conditions to entry).

[6] In *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), the principal lower federal court case upholding permit taxes, Circuit Judge Sanborn described the optional nature of the tax as follows:

> The permit tax of the Creek Nation, which is the subject of this controversy, is the annual price fixed by the act of its national council, which was approved by the President of the United States in the year 1900, for the privilege which it offers to those who are not citizens of its nation of trading within its borders. The payment of this tax is a mere condition of

asserting a power to exclude. The severance tax it attempts to impose affects the property rights of nonmembers who have entered the Reservation pursuant to contract and who have, in reliance upon those contracts, invested considerable sums in production and gathering facilities. The reach of the tax exceeds *Colville* and must fall.[7]

B. The tax cannot be justified on any other ground.

The tax cannot be upheld on any of the other grounds relied upon by the Tenth Circuit. First, the tax cannot be justified on any general or "platonic" notions of Indian sovereignty. *Cf. McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973). Not only is such "sovereignty" of a limited nature, which is subject to plenary control by Congress, but it is also restricted by the dependent status of the Indian tribes. In fact, this "dependent status" precludes any general power over non-Indians. Indian tribal sovereignty is limited to tribal "self-government." *United States* v. *Wheeler*, 435 U.S.

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the exercise of this privilege. No noncitizen is required to exercise the privilege or to pay the tax. He may refrain from the one and he remains free from liability for the other. Thus, without entering upon an extended discussion or consideration of the question whether this charge is technically a license or a tax, the fact appears that it partakes far more of the nature of a license than of an ordinary tax, because it has the optional feature of the former and lacks the compulsory attribute of the latter. 135 F. at 949.

[7] Even if the Tribe had the powers of a state or the federal government, there would be serious doubt that the Tribe could so "increase the take" and repudiate its contractual obligations. If such a tax were imposed by a state or the federal government under similar circumstances, it would raise serious problems under the contract clause or the due process taking clause of the Fifth Amendment. *See Puerto Rico* v. *Russell & Co.*, 315 U.S. 610 (1942); *Murray* v. *Charleston*, 96 U.S. 432 (1877); *cf. Perry* v. *United States*, 294 U.S. 330, 350-54 (1935); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 21-30 (1977).

313, 326 (1978). The tribe is sovereign in that it has the power, derived from its inherent sovereignty as distinct from any grant from the federal government or the states, to regulate its " 'internal and social relations.' " *White Mountain Apache Tribe* v. *Bracker*, *supra*, 100 S. Ct. at 2583. However, because of their dependent status, Indian tribes are prohibited from governing "every person within their limits except themselves." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 147 (1810), quoted in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). As explained in *United States* v. *Wheeler*, *supra*, the Indians have "implicitly lost" part of their sovereignty "by virtue of their dependent status" and the "areas in which such implicit divestiture of sovereignty . . . have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." Accordingly, tribes may not try nonmembers in tribal courts even for offenses committed on Indian reservations, *ibid.*, and *Oliphant* v. *Suquamish Indian Tribe*, *supra*. The same principles should preclude power to tax non-Indians, except as a condition of entry.[8]

Just as exercise of tribal criminal jurisdiction over non-members offends principles of individual liberty guaranteed by the Constitution, *Oliphant*, *supra*, the Tribe's attempt to exercise general powers of taxation over non-members is inconsistent with constitutional protection of property rights and participation in government. The provisions of the Constitution and Bill of Rights do not apply to Indian tribes in exercise of their

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[8] As noted in *Colville*, the "commonly shared presumption" (*cf. Oliphant*, *supra*, at 206) is that the power to tax non-Indians rests on the power to exclude and thus to attach conditions to entry, and this limited power is not "implicitly divested by virtue of the Tribes' dependent status." 100 S. Ct. at 2081. There is no "commonly shared presumption" of any broader taxing power over non-Indians, and any such power would be inconsistent with the dependent status of Indian tribes under the principles of *Oliphant* and *Wheeler*, *supra*.

powers of self-government involving members. Although the Indian Civil Rights Act, 25 U.S.C. § 1302 (1976), imposed certain restrictions upon tribal governments, the restrictions imposed are "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56-57 (1978). *See also Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553, 556-57 (8th Cir. 1958). The only remedy for a violation of rights guaranteed by the Indian Civil Rights Act is the "privilege of the writ of habeas corpus." *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 58, *quoting* 25 U.S.C. § 1303 (1976). As individual or corporate citizens of the United States and the states, exercising rights granted under leases issued pursuant to federal law, Petitioners should have the right to depend upon the exact provisions of the United States Constitution for protection of their property rights, and should not involuntarily be made subject to taxation at the hands of a legislative body in which they can never have any voice.[9] If the Tribe can exercise this governmental power over non-members, then it cannot be denied other powers of economic regulation normally exercised by sovereigns. May the Tribe regulate the price of oil and gas at the wellhead, or establish production and spacing allowables to restrict the rate of development to the Tribe's "sustained yield" philosophy? [10] If the Tribe may impose this tax, may it impose an income tax or windfall profits tax upon these Petitioners? The tribes vigorously assert the right to govern non-

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[9] *See* dissenting opinion of Chief Judge Seth (J.A. 170-71). While it is true that a resident of Colorado cannot object to New Mexico taxing his property in New Mexico, the Constitution guarantees that citizen the right to move to New Mexico, establish residence, and participate in government. No such right to participation can ever exist for non-members of the Tribe.

[10] *See* Article XI, § 1(a), Revised Constitution of the Jicarilla Apache Tribe (App. 12a).

members and to promote their economic status through regulation and taxation. Our federal system cannot permit recognition of nation-states of Indian tribes exercising governmental powers over non-members, unfettered by constitutional restraints.[11]

History confirms the lack of inherent sovereign power to tax non-Indians except as a condition to entry. As noted by Chief Judge Seth in dissent (J.A. 165-75), the Jicarillas had not exercised any sovereign power over non-Indians during the Spanish or Mexican occupations, and none was granted to them in the Treaty of Guadalupe Hidalgo. (*See* App. 1a-3a).[12] Indeed, it is undis-

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[11] *See* Act of March 3, 1871, 16 Stat. 566 (1871), 25 U.S.C. § 71 (1976). *See also* dissent of Chief Judge Seth (J.A. 169).

[12] Tribal assertions of general powers of taxation over non-members are very recent. In addition to the Jicarilla severance tax, the Navajo Tribe enacted "possessory interest" and "business activity" tax ordinances in 1978; both will affect mineral production. *See* Amicus Brief of Navajo Nation in the Tenth Circuit, Exhibit B-2. The Crow Tribe enacted a coal severance tax in 1976. *See* Amicus Brief of National Congress of American Indians, Inc., in *Colville, supra*, at 20. The Shoshone and Arapahoe Tribes of the Wind River Reservation enacted a severance tax in 1978, which became effective in 1980, after the decision of the Tenth Circuit in this case. Any tribe that has leased mineral resources for development can be expected to enact mineral taxes in the wake of the Tenth Circuit decision here.

The new Indian taxes are under challenge in a number of lawsuits. *See, e.g., Amoco Prod. Co.* v. *Harris*, C-80-0208 (U.S.D.C. Wyo., filed Jul. 15, 1980) (challenging the Shoshone and Arapahoe tax). The Amicus Brief of the Navajo Nation in the Tenth Circuit (p. 2) stated that six actions are presently pending in U.S. District Courts challenging the validity of the Navajo tax. One suit has been briefed and awaits argument in the Ninth Circuit. *Salt River Project Agricultural Improvement and Power District* v. *Navajo Tribe of Indians*, No. 78-352 (D. Ariz. Jul. 11, 1978), *appeal docketed*, Nos. 78-3492 and 79-3028 (9th Cir. Oct. 13, 1978). Another case was recently decided in Utah. *Southland Royalty Company* v. *Navajo Tribe of Indians*, Nos. C-79-0140, -0153, -0237, -0296 (D. Utah June 5, 1980) (adhering to the Opinion of the Tenth Circuit in this case).

puted that no treaty or statute expressly gives the Tribe any power to tax (J.A. 145).[13] No general power to tax non-Indians can be drawn from the Indian Reorganization Act. That Act does not mention taxation in confirming to the tribes "all powers . . . vested by existing law" (App. 8a) and, as shown above, that "existing law" is limited to taxation as a condition of entry.

Nor can the Tribe's taxing power spring from its "ownership" of the minerals underlying its Executive Order reservation. "Ownership" of real property does not by itself create the power to tax severance of products of the soil.[14] Moreover, the "title" of the Jicarilla is of a peculiar and limited character. The Executive Orders relating to the Jicarilla Apache Reservation do not grant "title" in the Reservation to the Tribe; rather, they merely "set apart" specified portions of land "as a reservation for the use and occupation of the Jicarilla Apache Indians." (App. 20a-24a). The Jicarillas' right of occupancy is subject to the plenary power of Congress to control use; they are tenants at will whose tenancy can be terminated without compensation. *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 327 (1942); *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676, 686-87 (9th Cir. 1976). Prior to the Act of March 3, 1927, 25 U.S.C. §§ 398a-c (1976) (App. 3a-5a), the minerals underlying Executive Order reservations had been leased as part of the public domain, with the tribes receiving nothing. The royalties the Jicarillas

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[13] The Tenth Circuit recognized that the Jicarilla Tribe's assertion of taxing power could not be founded on the Treaty. By contrast, the tribal power to tax upheld by this Court in *Morris* v. *Hitchcock*, *supra*, and relied upon by the Tenth Circuit, was based in part on treaty rights explicitly granting the tribes the power to impose permit taxes.

[14] Conversely, lack of ownership seldom precludes a government from exercising its taxing power. Thus, the State of New Mexico may tax the severance of the Jicarillas' mineral wealth even though New Mexico lacks any ownership interest in it.

receive today flow from rights created under that Act. Thus, their power to tax cannot be based upon any aboriginal ownership rights enjoyed by the Jicarillas over the minerals lying beneath their Executive Order reservation. Unquestionably the Tribe has an interest in the production of oil and gas from its Reservation; but the nature and extent of that interest have been created and limited by legislation which grants the Tribe the bonuses, rentals and royalties, and the states the power of taxation.

Finally, the Tenth Circuit erred in finding that the tax was "not inconsistent with the superior interests of the United States as a sovereign nation." As shown in the succeeding Parts II and III of this brief, the Tribal tax thwarts federal energy policy, upsets the balance of interests established by Congress in the 1927 Act (App. 3a), impairs the power of the states to raise revenue, impedes the free flow of commerce, and creates discriminatory differences in areas requiring national uniformity. Thus, the tax cannot be justified as a product of a retained power not inconsistent with federal interests. In fact, the dependent status of the Tribe precludes the exercise of such taxing power over non-Indians under the principles of *Wheeler* and *Oliphant*, *supra*.

II. ANY TRIBAL POWER TO TAX MINERAL PRODUCTION ON EXECUTIVE ORDER RESERVATIONS HAS BEEN DIVESTED BY CONGRESSIONAL ACTION AND OVERRIDING NATIONAL POLICIES.

Even if the Jicarillas had formerly enjoyed a general sovereign power to impose severance taxes on non-Indians, which we dispute, that power was long ago preempted by Congress in its plenary authority over the Tribe. In *Colville*, this Court held that Indians could, in exercising their power to exclude, tax transactions occurring on their lands and significantly involving their

interests unless "divested of it by federal law" or by necessary implication where such action would be "inconsistent with the overriding interests of the National Government." 100 S. Ct. at 2081. The Jicarilla Tribe is divested of its power to impose this tax for both of these reasons.

A. The Act of March 3, 1927 grants the states exclusive power to tax oil and gas production on Executive Order reservations.

After extensive debate and one failed attempt, Congress in 1927 enacted legislation authorizing the leasing of Executive Order reservation land which gave the tribes living thereon the right to all "rentals, royalties, or bonuses" derived from the leases, 25 U.S.C. § 398b (1976) (App. 4a); and to the states in which such reservations were located, the power to tax the entire output of oil and gas produced including the Indians' royalty share, 25 U.S.C. § 398c (1976) (App. 4a-5a). A review of the historical events prompting the passage of the 1927 Act leaves no doubt that its purpose and effect were to preempt the tribes from taxing mineral production from Executive Order reservations.

The first general statute authorizing leasing of Indian lands for mining was the Act of February 28, 1891, 25 U.S.C. § 397 (1976). This Act was applicable to lands "occupied by Indians who have bought and paid for the same" and was silent regarding taxation. The Act of June 30, 1919 (25 U.S.C. § 399 (1976)) authorized leasing of unallotted lands within reservations in several states (including New Mexico) for mining purposes and recognized the rights of the states to "levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee"; a 1926 amendment excluded oil and gas leases.

In 1924, Congress enacted what is now 25 U.S.C. § 398 (1976). That Act (43 Stat. 244) referred to the 1891

Act (25 U.S.C. § 397 (1976)) and itself authorized oil and gas leasing of unallotted Indian lands subject to leasing under the 1891 Act. Apparently because of the "bought and paid for" language in § 397, the 1924 Act was thought to apply only to treaty reservations. *See, e.g.*, 67 Cong. Rec. 10914 (1926). The 1924 Act specifically recognizes the states' right to tax oil and gas production from such Indian lands.[15]

In 1920 Congress passed the Mineral Leasing Act ("the 1920 Act") (41 Stat. 139 (1919)), one of many steps designed to encourage oil and gas leasing on public land. This Act authorized the leasing of public domain lands held by the United States, under a scheme which accorded 37½% of the value of sales, bonuses, royalties and rents collected under the Act to the states;[16] 52½% to a federal reclamation fund; and 10% to the Treasury Department. The 1920 Act explicitly preserved "the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States." 30 U.S.C. § 189 (1976). *See Mid-Northern Oil Co.* v. *Walker*, 268 U.S. 45 (1925). The result was both to expedite the leasing and production of minerals on federal lands and to engender a controversy in the Executive Branch which prompted passage of the 1927 Act.

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[15] 25 U.S.C. § 398 (1976) thus provides in part:

> *Provided*, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: *Provided, however*, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

[16] The states' share was increased to 50% in 1976. *See* 30 U.S.C. § 191 (1976).

Two years after passage of the 1920 Mineral Leasing Act, the Interior Department, acting on what this Court has termed the Executive Branch's "consistent . . . understanding" that "the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations," *Sioux Tribe of Indians* v. *United States, supra*, 316 U.S. at 327,[17] publicly took the position that Executive Order Indian reservations were subject to leasing as public domain under the 1920 Act. 49 L.D. 132 (1922). Accordingly, the Secretary issued various prospecting permits under the 1920 Act. Attorney General Stone subsequently took a contrary view, contending that the rights of tribes on treaty and Executive Order reservations were essentially equivalent, and that since the 1920 Act did not authorize the leasing of treaty lands, it did not apply to Executive Order reservations either. (34 Op. Att'y Gen. 171 (1924)). When the Attorney General sued to cancel the outstanding permits,[18] Congress sought to resolve the matter by passing the 1927 Act.

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[17] The court held in *Sioux Tribe* that the interest which the Indians received in Executive Order reservations was "subject to termination at the will of either the executive or Congress" without payment of compensation because the executive acting alone was without power to create a compensable interest in public lands. 316 U.S. at 331. *Accord, Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 175-76 (1947); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103 (1949).

[18] The government's attempt to cancel the permits already issued was rejected by the District Court in Utah on April 27, 1925. *See United States* v. *Harrison*, Equity No. 8288 (D. Utah 1925), discussed in H.R. Rep. No. 1791, 69th Cong., 2d Sess. 5 (1927). The Court of Appeals certified questions to this Court on December 10, 1925, but the case was dismissed by stipulation on March 14, 1927, following passage of the 1927 Act. *See United States* v. *McMahan* [*Harrison*], 273 U.S. 782 (1927).

The legislative history of that Act reveals that controversy persisted in the Congress between advocates of the states, the tribes, and those who had obtained permits in reliance on the Department of the Interior's 1922 ruling. The initial version of the bill paralleled the provisions of the 1920 Act. It authorized the leasing of Executive Order lands; retroactively protected those who had undertaken exploration in reliance upon permits issued by the Secretary; but provided a division of royalties between the states and the federal government similar to that under the 1920 Mineral Leasing Act. The states were to receive the same 37½% of all bonuses, rents and royalties from leased lands and the Treasury, 10%; however, the tribes were to receive 52½%, instead of the federal reclamation fund.

The proposed bill was attacked from all sides. Those who, like the Secretary of the Interior, believed that Executive Order Indians enjoyed no rights to the minerals, criticized it as overly generous to the tribes.[19] Others, who subscribed to the views of Attorney General Stone, objected on the theory that it accorded the states a benefit greater than they would have received merely from the power to tax the lessees.[20] Still others deemed the

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[19] *See, e.g.*, H.R. Rep. No. 763, 69th Cong., 1st Sess. 13 (1926) (minority views of Representatives Sproul, Hudson and Knutson) ("There would not seem to be any equity or fairness on the part of the Great White Father to lavishly give to his wards who already have plenty . . . .").

[20] *See, e.g.*, H.R. Rep. No. 763, *supra*, at 14-19 (minority views of Representative Frear). According to Representative Frear, at the time the bill was being debated in Congress, state royalty tax rates on the production of oil and gas averaged three percent of value. *Id.* at 17.

States' advocates argued, on the other hand, that the states received little benefit from the proposed royalties since they were required to allocate all of their portions to the construction and maintenance of roads and schools on the reservations. *See* H.R. Rep. No. 763, *supra*, at 4 (The "practical effect" of the division of

proposal inequitable to applicants for permits.[21]

The bill finally enacted was a carefully crafted compromise designed to satisfy all parties.[22] Thus, §§ 1 and 2 of the Act (25 U.S.C. §§ 398a-b (1976)) authorized the leasing of Executive Order reservation lands with royal-

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royalties originally proposed "was to require the expenditure of all the income from oil and gas leases either directly or indirectly for the benefit of the Indians," and for that reason the proposal to divide the royalties was ultimately abandoned.).

[21] President Coolidge vetoed the first version of the bill because, in his view, it provided an unwarranted benefit to permit holders without according a similar advantage to applicants for permits. *See* S. Doc. No. 156, 69th Cong., 1st Sess. 1-2 (1926).

[22] *See, e.g.*, H.R. Rep. No. 1791, *supra*, at 3, 6; S. Rep. No. 1240, 69th Cong., 2d Sess. 3, 5 (1927); 67 Cong. Rec. 10915, 10919 (1926) (remarks of Senator Bratton) (indicating that the proposed legislation would give all the royalties to the tribes and would give the states the power to tax in lieu of a share of the royalties); S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926) ("It has been deemed advisable to pay all the royalty income to the credit of the Indians and to permit the State to levy taxes on the entire production within its borders the same as upon unrestricted lands."); H.R. Rep. No. 763, *supra*, at 9; 66 Cong. Rec. 5433 (1925) (remarks of Congressman Hayden) ("Each House had previously agreed that a share of the benefit to come from the development of oil, gas and other minerals on unallotted Indian lands within Executive order Indian reservations should go to the State. Whether the State should have the right to directly collect a tax or whether a share of the rental or royalty should be paid in lieu of the tax was the issue. . . .").

S. Rep. No. 768, *supra*, at 4 stated:

> The enactment of this legislation will accomplish the following purposes:
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> 1. Permit the exploration of oil and gas on Executive-order Indian reservations.
> 2. Give the Indian tribes all the oil and gas royalties.
> 3. Authorize the States to tax production of oil and gas on such reservations.

See also H.R. Rep. No. 763, *supra*, at 3; S. Rep. No. 1240, *supra*, at 3; H.R. Rep. No. 1791, *supra*, at 3.

ties to be paid to the benefit of the Indians, while § 3 (25 U.S.C. § 398c (1976)) granted to the states power to tax "the entire output of oil and gas" [23] including the "share obtained for the Indians as bonuses, rentals, and royalties." Section 5 (25 U.S.C. § 398e (1976)) provided for the protection of prior permittees and applicants.

In short, Congress balanced the conflicting claims by expressly granting to the tribes the exclusive royalty interest and by granting to the states—not the tribes—exclusive power to tax the entire output of oil and gas on Executive Order reservations. This division was explained as being in accordance with a consistent congressional policy giving the states the power to tax mineral production from the public domain [24] as well as from various kinds of Indian reservations, whether established by treaty or otherwise.[25]

The Tenth Circuit opined that in passing the 1927 Act, Congress "simply did not think of the issue" of tribal taxation, but concluded that if it had, such taxation would have been permitted because the "majority . . . obviously thought that all benefits from the minerals on the reservations belonged to the Indians." (J.A. 158). This conclusion flies in the face of the statute and the legislative history.

If Congress had wanted to vest taxing power in both the tribes and the states, it could easily have done so.[26] Instead, it enacted only one taxing provision, explicitly according that power to the states (25 U.S.C. § 398c (1976)). The absence of a corollary provision on behalf

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[23] H.R. Rep. No. 1791, *supra*, at 4.

[24] *E.g.* Mineral Leasing Act of 1920, *supra*, 30 U.S.C. § 189.

[25] *See* H.R. Rep. No. 763, *supra*, at 5; S. Rep. No. 768, *supra*, at 6; S. Rep. No. 1240, *supra*, at 3. Examples of such legislation giving the states power to tax Indian lands are: 25 U.S.C. §§ 398, 399, 401, 501 (1976); 41 Stat. 1249-50 (1921).

[26] *Cf.* 25 U.S.C. §§ 319, 321 (1976).

of the tribes speaks for itself. Moreover, Congress' silence on this possibility in the debates and reports is equally persuasive.[27] Finally, the tribes' failure to enact production taxes until nearly half a century after passage of the 1927 Act emphasizes the universal understanding, contemporaneous with the congressional enactment, that the 1927 Act did not authorize or permit tribal severance taxes.[28]

The Tenth Circuit's hindsight conjecture as to how the Congress "might have voted" in 1927 had it actually considered the question of tribal taxation (J.A. 158) is a tacit admission that Congress did *not* intend the tribes to tax. Such conjecture cannot reliably inform statutory construction, and should not serve to overcome the plain intent of Congress or to undo the careful bal-

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[27] During the four years of extensive legislative activity that led to the 1927 Act, it was apparently not once suggested by any of those debating the moral and legal rights and interests of Executive Order tribes with respect to minerals underlying their reservations that such tribes would not only receive the royalties but also have power to tax non-Indian lessees for the same output the states were expressly authorized to tax. *See* S. 876, 68th Cong., 1st Sess. (1924); 66 Cong. Rec. 998-99 (1924); 66 Cong. Rec. 2233-34, 5432-34 (1925); H.R. Rep. No. 1254, 68th Cong., 2d Sess. (1925); H.R. Rep. No. 763, *supra*; S. Rep. No. 768, *supra*; 67 Cong. Rec. 10912-25, 11379-90, 11528-30, 12641 (1926); H.R. Rep. No. 1791, *supra*; S. Rep. No. 1240, *supra*; 68 Cong. Rec. 4569-81 (1927).

[28] Although New Mexico has been taxing oil and gas production since 1937, the Jicarilla Severance Tax Ordinance was not enacted until 1976. Tribal attempts to tax mineral production are of very recent origin, *see* n.12, p. 13, *supra*. The Final Report of the American Indian Policy Review Commission (hereinafter "AIPRC Final Report") acknowledges that as of the date of the Report (1977), Indian Tribes usually received royalties but not taxes from mineral production. 1 AIPRC Final Report 344. The Report recommended tribal enactment of such taxes, and repeal of 25 U.S.C. §§ 398 and 398a (1976) in order to permit tribal taxation. 1 AIPRC Final Report 174, 181, 347.

ance of interests struck by the Act.[29] Indeed, the court's conjecture is blatantly inconsistent with congressional action on these matters since 1919.

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[29] The Tenth Circuit also mentioned but did not adopt (J.A. 158) the Tribe's argument that the General Leasing Act of 1938, 25 U.S.C. §§ 396a-f (1976) (App. 9a-12a), repealed the 1927 Act and thus ended the power of the states to tax mineral wealth on Indian lands.

This position is utterly without basis. The 1938 Act does not address taxation and does not repeal any specified statutes. The brief legislative history of the 1938 Act shows no controversy or debate and contains no indication that the Act would deprive the states of their right to tax production on Indian lands. *See* S. Rep. No. 985, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938); 81 Cong. Rec. 8399 (1937); 83 Cong. Rec. 6057-58 (1938). It is most unlikely that Congress, after spending more than a year hammering out a significant compromise in the 1927 Act, would allow its work to dissolve in silence in 1938. Moreover, it is startling that the tribes would have waited four decades before attempting to vindicate rights which they now claim.

The Tribe's position is further undermined by the established canon that repeals by implication are not favored. *See, e.g., Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). That rule is particularly applicable to situations such as this, in which it is claimed that a "narrow, precise and specific" statute is impliedly repealed by a broader, more general enactment. *See Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

B. The Jicarilla tax is preempted because it is "inconsistent with the overriding interests of the National Government."

The Tribal severance tax is also barred because it would conflict with three overriding national interests.

First, at the very least the 1927 Act evidences a continuing congressional policy of placing the taxing power in these situations in the states. There has been no deviation from this policy since Congress as early as 1919 enacted legislation authorizing the states to tax production on Indian lands. The concurrent exercise of taxing power by the tribes of necessity would adversely affect the states' power to tax. A tribal tax would affect the economics of production, rendering existing marginal wells less likely to continue producing in paying quantities, and retarding development of marginally economic prospective wells. Indian severance taxes will affect the rate of production against which the state taxes are measured, and require the states to reduce taxes or forego prospective increases[30] in pursuing state policies of maximizing tax revenues from mineral production without discouraging needed production.[31] The additional burden of tribal taxes would hamper the states' capacity to exercise their congressionally-granted power of taxation of oil and gas production from reservation lands.[32]

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[30] New Mexico imposes several taxes on oil and gas production from all lands within the state. *See* n.2, p. 3, *supra*. In recent years, New Mexico has frequently adjusted its oil and gas severance tax rate, closely following the economics of the industry. *See* 1974 N.M. Laws, Ch. 40; 1977 N.M. Laws, Ch. 102; 1980 N.M. Laws, Ch. 62.

[31] *See* Jones, *The Struggle for Equitable Taxation of Mines—The New Mexico Example*, 16 Rocky Mtn. Min. L. Inst. 463, 478 (1971).

[32] The amicus briefs filed in this Court on behalf of western states forcefully demonstrate that Indian severance taxes cannot co-exist with the taxes states have historically levied upon oil and gas production, including the taxes specifically authorized by the 1927 Act.

Second, the Jicarilla tax undermines the long-standing congressional policy favoring leasing and development of oil and gas reserves on Indian lands pursuant to uniform federal standards. The 1927 Act is only a small part of the fabric of federal laws concerning production of oil and gas from Indian lands. 25 U.S.C. § 396a-f (1976), enacted in 1938 (App. 9a-12a), regulates the entire process of leasing reservation lands for oil and gas mining purposes. Petitioners' leases (on printed forms prescribed by the Secretary, 25 C.F.R. § 171.30 (1980)) and attached "Special Stipulations" and "Forest and Land Protection Stipulations" mandate federal inspection, supervision, and approval of daily activities of lessees by the United States Geological Survey (U.S.G.S.) Oil and Gas Supervisor and the Bureau of Indian Affairs (BIA) Superintendent. 25 U.S.C. § 396d (1976) provides that "[a]ll operations of lessees of restricted Indian lands are subject to rules and regulations promulgated by the Secretary of the Interior."

The regulations specifically applicable to Indian oil and gas leases are comprehensive. They cover many aspects of the leasing process and lease operations, including advertising, Secretarial approval, bonds, acreage limitations, unitization, rental and royalty payments, and other areas of federal supervision and discretion. *See* 25 C.F.R. §§ 171.1 to 171.30 (1980). They also require the lessee to comply with the U.S.G.S. "Oil and Gas Operating Regulations." Those regulations, 30 C.F.R. pt. 221 (1979), embrace 67 separate regulations imposing additional production and conservation requirements upon lessees, committing numerous determinations to Secretarial discretion, and requiring considerable day-to-day federal inspection and supervision. Oil and gas lessees on Indian lands are also subject to numerous additional federal regulations governing activities incident to exploration and production operations and prescribing a myriad

of conservation and environmentally protective measures.[33]

Every aspect of leasing, exploring for, developing, and producing oil and gas from the Jicarilla Apache Reservation is subject to intensive, detailed, and day-to-day regulation, inspection, and supervision by the U.S.G.S., the BIA, and other federal agencies. This regulation is at least as pervasive, if not more so, than that involved in *White Mountain Apache Tribe* v. *Bracker*, —— U.S. ——, 100 S. Ct. 2578 (1980). *See also Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965). The Indian severance tax places additional burdens upon lessees and affects their ability to comply with the numerous requirements imposed by federal law. Perhaps even more importantly, the Tribe and the Secretary urge that the purpose of the tax is regulatory as well as economic.[34] The additional burdens imposed by the tax will

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[33] *See* 25 C.F.R. §§ 161.1-.20 (1980) (rights-of-way); 25 U.S.C. § 321 (1976), 25 C.F.R. § 161.25 (1980) (pipelines); 25 C.F.R. §§ 162.1-.19 (1980) (BIA roads). *See also* Safe Drinking Water Act, 42 U.S.C. §§ 300f through 300j-9 (1976), *as amended by* the Safe Drinking Water Amendments of 1977, Pub. L. No. 95-190, 91 Stat. 1393, *and by* Act of September 6, 1979, Pub. L. No. 96-63, 93 Stat. 411; 40 C.F.R. pt. 146, especially 40 C.F.R. §§ 146.5(b), 146.21-.25 (1980); 33 U.S.C. § 1342 (1976 & Supp. III 1979); 40 C.F.R. §§ 122.1-.60 (1980) (NPDES); 33 U.S.C. § 1311 (1976), 40 C.F.R. §§ 435.32, 435.50-.52 (effluent discharges). Even the price of natural gas, oil, or hydrocarbons produced on the Indian leases is subject to federal regulation. Natural Gas Policy Act of 1978. 15 U.S.C. §§ 3301-3432 (Supp. III 1979); Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-56 (1976), *as amended by* Act of December 5, 1974, Pub. L. No. 93-511, 88 Stat. 1608 *and by* Emergency Petroleum Allocation Act of 1975, Pub. L. No. 94-99, 89 Stat. 471 *and by* Act of December 22, 1975, Pub. L. No. 94-163, 89 Stat. 941-55.

[34] *See* Brief in Chief of Secretary of the Interior in the Tenth Circuit at 22-23, 27, arguing that the "sovereign" right to tax is

"disturb and disarrange" the pervasive federal regulatory scheme, and the Jicarilla severance tax should be preempted just as the state taxes were in *White Mountain Apache Tribe* v. *Bracker*, and *Warren Trading Post Co.* v. *Arizona Tax Commission, supra.*[35]

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necessary to "restrict depletion" of the Tribe's mineral resources and to protect those resources from state and corporate "encroachment." *See also* 1 AIPRC Final Report 179. The Preamble to the Jicarilla Tax Ordinance recites that the Tribe has the obligation to develop its resources on "sustained yield principles" for the general welfare of the Tribe as a whole (App. 12a). In its opposition to the petitions for certiorari the Tribe argues that it has had to take action to protect its rights under mineral leases and protect the environment of its reservation "from irresponsible and unnecessary degradation" (p. 7), that its tribal resources cannot be equated to "publicly owned property" (p. 9), and that:

> approval by this Court of the tribal power to impose severance taxes on non-Indians will subject Petitioners' exploitation of mineral resources on tribal lands to reasonable regulation and taxation by the Jicarilla Apache Tribe. . . . (p. 32).

[35] The Tenth Circuit dismissed the effect of the federal regulatory scheme on the basis of 25 U.S.C. § 396b (1976), which provides that the right of tribes organized under the Indian Reorganization Act to lease lands for mining purposes "as therein provided" should not be restricted by the General Leasing Act of 1938. The court concluded that inasmuch as Congress had allowed IRA tribes "to assume and define for themselves the leasing process," Congress had not "intended to so occupy the field of regulating leasing of tribal property for oil and gas leases that the tribes could not impose additional burdens on lessees through exercise of the power of taxation." J.A. 159-61. The Tenth Circuit misconstrued these statutes. The Indians may not "define for themselves the leasing process." The leases involved here were not issued pursuant to the authority reserved to the Tribe in 25 U.S.C. § 477 (1976), but were issued pursuant to the pervasive federal regulatory scheme. Any lease for a term of longer than ten years (the maximum permitted by the IRA provision), or any sale of an interest in tribal lands, must be approved by the Secretary of the Interior and cannot be effected by an IRA tribe alone. 25 U.S.C. § 477 (1976). An IRA tribe desiring to take advantage of 25 U.S.C. § 396b (1976) and 25 U.S.C. § 477 (1976) must specify the procedures for leasing in its constitution or charter, and the consti-

Finally, the Jicarilla tax undermines the national interests in promoting the development of domestic oil and gas resources and curbing inflationary energy costs.[36] The Jicarilla tax significantly impacts the economics of production, rendering existing marginal wells less likely to continue producing and retarding development of marginally economic prospective wells. Even if the tax is passed on in its entirety, the additional tax must be

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tution or charter must be approved by the Secretary. *See* 60 I.D. 331 (1949). The regulations adopted by the Secretary provide that they are applicable to any lease, even one issued by an IRA tribe pursuant to 25 U.S.C. § 477 (1976), if the validity of the lease depends upon the approval of the Secretary. 25 C.F.R. § 171.29 (1980). Thus, even if the Tribe sought to avail itself of the authority of the IRA provision, substantial and pervasive federal controls would still exist, and continue to foreclose an inconsistent and disruptive Tribal tax.

[36] President Carter said in his State of the Union Address, January 23, 1980, 126 Cong. Rec. H168 (daily ed. Jan. 23, 1980):

> "Our excessive dependence on foreign oil is a clear and present danger to our nation's security.
>
> The need has never been more urgent.
>
> * * * *
>
> The single biggest factor in the inflation rate last year . . . was from one cause, the skyrocketing prices of OPEC oil. We must take whatever actions are necessary to reduce our dependence on foreign oil—and at the same time reduce inflation.

These national interests are also reflected in legislation. Energy Supply and Environmental Coordination Act of 1974. 15 U.S.C. §§ 791, *et seq.* (1976); Natural Gas Policy Act, 15 U.S.C. §§ 3301 *et seq.* (Supp. III 1979). *See also* 30 U.S.C. § 21a (1976), adopted in 1970:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, [and] (2) the orderly and economic development of domestic mineral resources . . . .
>
> For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium. . . .

absorbed by the consumers and will inevitably result in increasing energy costs.[37] Moreover, the severance tax will hamper production in yet another, more significant respect. The proponents of Indian taxation have argued that the new taxes are a "sovereign tool" necessary to enable the tribes to control the rate of extraction of natural resources.[38] Apart from the impact of Indian regulation of oil and gas development on existing federal regulatory policies,[39] the nation can ill afford to permit the councils of those tribes having minerals under lease—among the 287 Indian tribes in this country—[40] to frustrate national objectives by restricting at will the production of vital resources.

III. THE TRIBAL TAX VIOLATES THE COMMERCE CLAUSE BY PROVIDING A DISCRIMINATORY BENEFIT TO LOCAL INDUSTRY AND IMPOSING A MULTIPLE BURDEN UPON NATIONAL COMMERCE.

The Tenth Circuit's conclusion that the Jicarilla Tribal tax neither discriminates against nor burdens the free flow of interstate commerce rests on a misreading of the

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[37] The Jicarilla tax is 5 cents per million BTU of gas and 29 cents per barrel of oil (App. 14a). When it is added to the New Mexico taxes, the combined tax burden amounts to 29 percent of the interstate price of old gas and over 12.5 percent of the price of old oil. The tax will yield over $2,000,000 annually to the Tribe. (J.A. 130, 143).

The District Court found that producers would have the right under their contractual provisions to pass most of the burden of the Tribe's tax onto their consumers—which would inevitably increase the prices paid by those consumers—but that if the producers were required to absorb the tax it would substantially limit their ability to operate profitably some of the existing wells, requiring them to shut down such wells (J.A. 130).

[38] *See* n.34, p. 26, *supra.*

[39] *See* discussion at pp. 25-27, *supra.*

[40] *Santa Clara Pueblo* v. *Martinez, supra,* 436 U.S. at 65, n. 21.

express language of the Tribe's Ordinance, a disregard for the underlying purpose of the Interstate Commerce Clause as articulated by this Court, and a misapplication of the Tenth Circuit's own test under the Indian Commerce Clause. The decision below encourages all tribes to establish protected industries on their reservations, subsidized by discriminatory taxes, and without regard to their detrimental effects upon commerce throughout the rest of the nation. If it should stand, that decision will foster the balkanization of commerce that this Court has consistently opposed whenever states and municipalities have sought to enact measures to protect local industries at the expense of the rest of the nation. The Jicarilla tax is discriminatory on its face, is imposed upon an activity integrally related to interstate commerce, and creates a multiple burden upon national commerce.

A. The Commerce Clause of its own force restrains the Tribe from impeding the free flow of national commerce.

Article I, Section 8 of the Constitution empowers the Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Decisions of this Court have long recognized that the Commerce Clause of its own force restrains the states from interrupting, burdening, or discriminating against the free flow of interstate commerce. *See, e.g., Gibbons* v. *Ogden*, 22 U.S. (6 Wheat.) 1, 88 (1824); *Cooley* v. *Board of Wardens*, 12 U.S. (1 How.) 299 (1852). *See also, Boston Stock Exchange* v. *State Tax Commission*, *supra*, 429 U.S. at 328; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-71 (1976); *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946).

Although the states have a "residuum of power" to make laws governing local events, the Commerce Clause embodies an "overriding requirement of a national 'com-

mon market' . . . ." *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 350 (1977). Its "very purpose . . . was to create an area of free trade among the several States." *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944). In order to effectuate this overriding national purpose, the Commerce Clause has been read to restrain states from impeding the flow of commerce between the United States and foreign nations; between the federal government and the Indian tribes lying within the jurisdictional borders of the state itself; and with, among, or between one or more other states or parts thereof. Moreover, even though they are not explicitly mentioned in the Commerce Clause, political subdivisions within a state are likewise restrained from hampering the flow of commerce in any of the aforementioned ways. *See Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951). Indeed, the only entities within the nation whose actions, as they affect interstate commerce, have not yet been expressly held subject to the restrictions of the Commerce Clause are the Indian tribes.

The reasons for this omission are rooted in history. At first regarded as akin to foreign nations, existing beyond the western borders of the states, *see Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832), the tribes have generally been left free to govern their internal affairs without observing those constraints framed specifically as limitations on federal or state authority. *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 56. The one constitutional provision that does unmistakably apply to the tribes is the Commerce Clause. In the past, however, that clause has been used solely as a vehicle for protective legislation to shield the tribes from the lawlessness of the frontier. *See, e.g., Oliphant* v. *Suquamish Indian Tribe*, *supra*, 435 U.S. at 201; *cf. United States* v. *Mazurie*, 419 U.S. 544, 554 (1975). The extent to which the Commerce Clause restricts the activities of the tribes is a question not yet directly addressed by this Court.

Nonetheless, past decisions concerning other areas of Indian affairs clearly suggest that tribes, in the same manner as states, must be restrained by the operation of the Commerce Clause. The unmistakable movement gradually to incorporate American Indians into the mainstream of the nation's political, economic and social life has been amply documented in the decisions of this Court.[41] As the Court has noted, with the passage of time and in numerous ways "the United States [has] beg[un] to consider the Indians less as foreign nations and more as a part of our country." *Organized Village of Kake* v. *Egan, supra*, 369 U.S. at 72. Today, Congress "follow[s] a policy calculated eventually to make all Indians full-fledged participants in American society." *Williams* v. *Lee, supra*, 358 U.S. at 220. Thus, it is only appropriate that when tribes engage in conduct directly and substantially affecting the flow of commerce beyond their jurisdictional borders, their actions should be subject to the same constitutional constraints applicable to all other entities.

The Court of Appeals accepted the principle that "the Commerce Clause . . . of its own force limits the power of the tribes as well as the states" (J.A. 152), but misapplied it, as we now discuss.

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[41] More than a century ago Congress abandoned the fiction that tribes, as foreign nations, must be dealt with by treaty. *Compare Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-66 (1903), *with Worcester* v. *Georgia, supra*, 31 U.S. (6 Pet.) at 556. *See* 16 Stat. 566 (1871). In a host of areas the scope of tribal authority has been constricted and tribal members have been rendered subject to the regulatory powers of the state. *See Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-49 (1973); *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962); *Warren Trading Post Co.* v. *Arizona Tax Comm'n, supra*, 380 U.S. at 687 n.3 (1965); *Williams* v. *Lee*, 358 U.S. 217, 219-20 (1959); 28 U.S.C. § 1360 (1976) (granting to specified states "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . .").

B. The Jicarilla tax discriminates against interstate and Indian commerce.

The Tenth Circuit misconstrued the Tribe's Ordinance and the decisions of this Court in holding that the Jicarilla tax does not discriminate against interstate commerce and Indian commerce. By its terms, the Ordinance taxes only oil and gas that is "severed, saved and removed from Tribal lands" and is "sold or transported off the Reservation" (App. 14a). These phrases are not "ambiguous" nor do they have the meaning ascribed to them by the Court of Appeals as taxing production removed "from the soil" and "that is sold *on* the reservation or transported off the reservation before sale" (J.A. 155) (emphasis added). Had the Tribe intended this meaning, surely they would have chosen different language. The manifest intent of the Ordinance is to tax oil and gas which is "removed from" the Reservation, *i.e.*, sold off the Reservation or transported off the Reservation.[42] In plain language, the Ordinance exempts from taxation oil and gas sold *on* the Reservation; kept *on* the Reservation for use in industry or agriculture; or taken by the Tribe *on* the Reservation as in-kind royalty.[43]

By discriminating between products taken off the Reservation and those utilized on it, the Jicarilla tax on its face violates the Commerce Clause. This Court has

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[42] The Tenth Circuit's reading of the Ordinance strains credulity. Not only does it render the Ordinance's language unnecessarily redundant (since to "sever" means to "remove from the soil"), but it also ignores the geographical progression embodied in the language: the minerals are first brought out of the ground ("severed"); moved to storage on the surface ("saved"); then shipped off the Reservation ("removed"). The conjunction chosen by the drafters of the Ordinance ("and") means that only minerals exposed to all three stages of the geographical progression are subject to the tax.

[43] The Ordinance specifically provides an exemption for "royalty gas, oil or condensate taken by the Tribe in kind . . . ." (App. 14a).

repeatedly condemned such discrimination favoring local enterprises when the commerce involved is "among the several States." *See Boston Stock Exchange* v. *State Tax Commission, supra,* 429 U.S. at 329, and cases cited therein. Moreover, local legislative action with the purpose and effect of fostering " 'simple economic protectionism' " is subject to " 'a virtually *per se* rule of invalidity' " if it substantially impedes interstate commerce. *Lewis* v. *BT Investment Managers, Inc.*, —— U.S. ——, 100 S. Ct. 2009, 2015 (1980), *quoting City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

The facts of this case amply illustrate why the same framework of analysis used by the Court in Interstate Commerce cases should be equally applicable to cases under the Indian Commerce Clause. The Tenth Circuit's decision permits the Tribe to market oil and gas under a two-tiered pricing system, with one price for customers beyond its borders, and one for those on the Reservation. From the Tribe's perspective, tax discrimination has both immediate and long-term benefits. It permits the collection of substantial revenues without raising the price of oil and gas consumed on the Reservation; it allows the Tribe to resell its royalty share of production on the Reservation without incurring tax liability; and it fosters the development of subsidized industries on the Reservation.[44]

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[44] Any refiner located on the Reservation would enjoy a competitive advantage over Petitioners and Petitioners' customers due solely to the existence of the discriminatory tax. The possibility that refineries or processing facilities would relocate on the Reservation is not mere speculation. The Tribe has announced its intentions to use royalty gas for industry and for agriculture and to enter into the natural gas production and marketing business. Tr. at 257, 271; *Jicarilla Apache Tribe* v. *FERC*, 578 F.2d 289, 290 (10th Cir. 1978); Plaintiff's Amended Proposed Findings of Fact and Conclusions of Law, Proposed Finding No. 78, in *Jicarilla Apache Tribe* v. *Southern Union Gas Co.*, D.N.M. No. CV-75-247M.

The majority of the court below failed to perceive the inherent dangers of the Tribal taxing scheme. After observing that the Indians were not presently involved in the production of oil or gas, the Court concluded that it would be "fruitless and wasteful" to require the Tribe to tax its own receipt of in-kind royalty (App. 154). This assertion simply misses the point. It ignores the substantial possibilities that the Tribe would sell its own tax-free royalty portion *on* the Reservation to third-party producers or distributors for ultimate resale, either before or after processing, off the Reservation; or would develop its own production and processing facilities further to capitalize upon its tax-free oil and gas; or would induce major petroleum processors to relocate on the Reservation solely to escape the discriminatory tax burden imposed by the Tribe upon processors, such as the Petitioners, located off the Reservation.[45]

The Jicarilla Ordinance adds a new twist to the taxing scheme invalidated by the Court in *Colville, supra.* Instead of marketing on the Reservation a tax exemption derived from state law, as the *Colville* tribes sought to do, the Jicarillas have foisted a tax on those who live outside the Reservation, and created their own exemption from it, which they then may seek to market on the Reservation. The result, however, is the same as the one condemned in *Colville:* the establishment of a tax-free enclave on the Reservation at the expense of the surrounding areas.

The harm flowing from the Jicarilla tax is much greater than that feared by the Court in *Colville.* First, the locus of injury is much wider here than it was in *Colville.* The sale of tax-exempt cigarettes on the reser-

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[45] Under any of these scenarios, the discriminatory tax will benefit those who purchase directly from the Tribe on the Reservation while injuring those, like Petitioners, whose production, marketing and refining operations straddle state and tribal boundaries. Judge Barrett made precisely this point in dissent (J.A. 196).

vation to non-tribal members injured only those merchants competing in the immediate vicinity. On the other hand, a discriminatory tax on the production of oil and gas shipped directly into interstate commerce affects customers throughout the nation. Second, the Jicarilla tax thwarts the federal goal of developing indigenous sources of energy. At a time when the country seeks to reduce dependence upon foreign oil, restraints upon the production, distribution and nationwide sale of petroleum products severely implicate vital national interests.

Finally, the Jicarilla tax is unrestrained by the economic and political pressures that normally serve to curb a sovereign's taxing power. As this Court noted in *Colville*, a tribe which taxes the merchandise it markets will have an economic incentive to maintain its tax at reasonable levels. An excessive tax will discourage sales, even to those living near outlets on the Reservation. Moreover, where the tribal members are themselves subjected to the tax (as they were in *Colville*), they may use their political influence on the Tribal government to discourage taxation at excessive levels. Neither of these factors restrains the Jicarilla tax. The higher its level, the more benefit accrues, without any corresponding detriment, to the Tribe. Because the producing companies have already agreed to long-term leases, and made substantial capital investments on the Reservation, they would not abandon their operations, until the tax becomes prohibitive. In addition, the fact that the Tribe has exempted itself from the tax burden which befalls the rest of the consuming public located outside the Reservation makes internal opposition by Tribe members to tax increases unlikely. The Petitioners, like the class of consumers to whom they sell oil and gas from the Reservation, have no recourse to the Tribe's political processes. Thus the tax, unrestrained by normal economic and political pressures, could severly impact interstate commerce.

C. The Tribal Ordinance violates the Commerce Clause because it taxes an activity which is an integral part of the flow of commerce.

The Court's conclusion that the Jicarilla tax was not "levied on the privilege of engaging in interstate commerce itself" (J.A. 154) rests on the flawed premise, already discussed, that the taxable event is the "local activity" of severance. Although labelled a severance tax, with payment said to "be due at the time of severance," the Jicarilla Ordinance in fact applies only to the shipment of goods *off* the Reservation, not the act of severance *on* the Reservation.[46] Thus, the tax is imposed only after the last of three conditions has been fulfilled: the oil or gas must have been "severed, saved *and removed from* Tribal lands." At that point, when the tax becomes applicable, the oil or gas is already in transit beyond the Reservation's borders.

It is settled that a sovereign state may not tax goods in interstate commerce if it "has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, supra,* 347 U.S. at 167. Notwithstanding its appellation, the Jicarilla tax, as the one invalidated in *Michigan-Wisconsin Pipe Line Co., supra,* is "not levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing." *Id.* at 169 (emphasis in original). Because the tax is imposed upon an activity integral to and inseparable from the flow of interstate commerce, it cannot stand.

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[46] The validity of a tax must be judged by its effects, potential and actual, upon commerce, rather than by its label. *See Michigan-Wisconsin Pipe Line Co.* v. *Calvert, supra,* 347 U.S. at 164. *See also Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279 (1977); *Gwin, White & Prince Inc.* v. *Henneford,* 305 U.S. 434, 439 (1939).

The tax is invalid under this Court's decision in *Michigan-Wisconsin Pipe Line Co.* regardless of whether the Reservation's border with New Mexico is treated as the equivalent of a state line. An overwhelming portion of the oil and gas taken by Petitioners and subject to the Jicarilla tax flows from the Reservation directly into interstate commerce; the tribal tax levied upon its shipment substantially impedes that flow.[47] Just as a political subdivision within a state may not impose discriminatory restrictions upon interstate trade,[48] so too, the Tribe, if it is a taxing entity within the confines of New Mexico, may not impede interstate commerce. Its Ordinance must fail regardless of its impact upon commerce within New Mexico. Moreover, the Tribe's tax is invalid under *Michigan-Wisconsin Pipe Line Co.*, whether or not any other taxing jurisdiction has actually imposed a similar tax upon the same activity. It is enough to engage the Commerce Clause that the tax was levied upon an activity integral to the flow of interstate commerce—the shipment of goods across tribal and state lines—and that it produced a substantial adverse impact upon interstate commerce.

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[47] The trial court found and the Tenth Circuit accepted for purposes of the appeal that imposition of the Jicarilla tax substantially affected interstate commerce in several ways. If upheld, the tax will: (1) apply to all of that portion, comprising approximately 80% of the Reservation's output, of petroleum products shipped from the Reservation to destinations outside of New Mexico; (2) raise the interstate price of old gas by 29%, and of old oil by 12.5%, when added to the New Mexico taxes; (3) net tax payments of approximately two million dollars annually, a cost which would be passed on to the ultimate consumers; and (4) result in the abandonment by the Petitioners of certain existing wells on the Reservation. (J.A. 129-30, 143).

[48] *See, e.g., Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 at n.4 (1951); *West Point Wholesale Grocery Co.* v. *City of Opelika*, 354 U.S. 390 (1957).

D. The Tribe's oil and gas severance tax imposes a multiple burden on interstate commerce in that the State of New Mexico taxes the same activity at full value.

Even if the Tribe were to amend its taxing Ordinance to remove the defects noted above, and enacted in its place a non-discriminatory tax whose incidence truly fell upon severance, the new tax would still be improper. *Any* Tribal severance tax additive to New Mexico's taxes on the same activity will create a multiple burden upon commerce and thereby violate the Commerce Clause.

In order to satisfy the requirements of the Commerce Clause, a state tax upon local activities related to interstate commerce must be "applied to an activity with a substantial nexus with the taxing State, [be] fairly apportioned, . . . not discriminate against interstate commerce and [be] fairly related to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady, supra,* 430 U.S. at 279. *See also Exxon Corp.* v. *Wisconsin Department of Revenue,* —— U.S. ——, 100 S. Ct. 2109, 2122 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes,* —— U.S. ——, 100 S. Ct. 1223, 1234 (1980).

This Court has often held that state tax statutes not apportioned on their face to the value of activities carried on within the taxing state cause the risk of multiple taxation, in that local activities related to interstate commerce may be subjected to a "multiple burden" of taxation to which purely local commerce is not exposed.[49] Once again, these same principles, applicable to

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[49] *See, e.g., Department of Revenue* v. *Association of Washington Stevedoring Cos.,* 435 U.S. 734, 750 (1978); *Standard Pressed Steel Co.* v. *Department of Revenue,* 419 U.S. 560, 563-64 (1975); *J.D. Adams Mfg. Co.* v. *Storen,* 304 U.S. 307, 311 (1938); *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 255-56, 260 (1938); *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.,* 303 U.S. 604, 612-13 (1938).

states, should be extended to restrain the Tribe under the Commerce Clause.

The Tenth Circuit misapplied the Commerce Clause and this Court's decision in *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), and thereby rendered the doctrine of multiple burden inapplicable to cases involving tribal industry on the Reservation. In *Western Live Stock* the Court, referring solely to the interstate portion of the Commerce Clause, stated that the vice characteristic of those local taxes which have been held impermissibly to burden interstate commerce is that they are "of such a nature as to be capable, in point of substance, of being imposed—or added to—with equal right by *every state* which the commerce touches. . . ." *Id.* at 255-56 (emphasis added). Relying on a crabbed reading of this language, the court below concluded that since only one "state"—New Mexico—could tax the local event of severance, there is no possibility of multiple taxation.[50] This conclusion, though consistent with the Court's literal language, fails to recognize the unique burden created by a tribal tax and ignores the Commerce Clause's underlying purpose of creating a uniform, national "common market" free of trade restraints.

Although only one "state" is involved, two "sovereigns" have asserted taxing power over the minerals in the Reservation. Unlike two geographically separate states, both taxing jurisdictions here are independent but geographically concentric. Each can justify[51] its tax by claiming the required special relationship, or nexus, with the taxed

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[50] This conclusion embodies two separate strands of thought: first, that no states other than New Mexico have sufficient relationship to the production of the oil and gas to impose a severance tax; and second, that the Tribe, though a "sovereign," is not a "state."

[51] This argument assumes, of course, that the Tribe has the power to levy this tax and amends its Ordinance in such a way that the taxable event is the severance of oil and gas, not their interstate shipment.

item. Each can claim that its tax falls upon a local activity carried on within the territory of the sovereign, *i.e.*, the severance of the same oil and gas from the same land. Each has assessed the taxed item at "full value," *i.e.*, the full value of the gas and oil at the time of production. Each can claim that its tax is levied only upon the value of that portion of interstate activities falling within its taxing jurisdiction, and thus automatically is "fairly apportioned," and produces no multiple burden upon interstate commerce. The problem, of course, is that although the claims of both jurisdictions may be justified, the result is the imposition of a multiple burden upon the taxpayer.

Although the situation presented when overlapping jurisdictions impose identical taxes upon the same tax event is unique, it has an analogy in the case law. In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), the Court found that California's *ad valorem* property tax on foreign shipping containers present in the state, though fairly apportioned and accurately assessed, created the risk of a multiple burden upon international commerce and frustrated the achievement of federal uniformity. In order to eliminate the unique risk of multiple burden created when a state and a foreign nation share concurrent power to tax the identical event—a burden that could not be alleviated merely by requiring the state to apportion its tax—the Court required "an inquiry more elaborate than that mandated by *Complete Auto.*" *Id.* at 451. It held that a fairly apportioned, nondiscriminatory state tax on an activity with a substantial nexus to the taxing jurisdiction would nonetheless violate the Commerce Clause if it created a substantial risk of multiple taxation and frustrated the achievement of federal uniformity in an area in which uniformity was necessary.

Because tribes are no longer deemed foreign nations, the Court's approach in *Japan Line, Ltd.* is not disposi-

tive of the case at bar. It does, however, serve to highlight the constitutional flaws of the Jicarilla Ordinance. The Tribe's tax does more than create a "substantial risk" of multiple taxation: it creates the actual burden of double taxation at full value.[52] Moreover, like California's tax on foreign shipping containers, the Jicarilla Ordinance frustrates federal policy in several significant ways. The tax undermines the federal imperative of developing a uniform national energy policy. By virtue of their unbridled taxing power, the Jicarillas can substantially affect the price of interstate oil and gas and can determine whether existing wells will remain producing or prospective wells will be drilled. Furthermore, the tax frustrates the national objective, already described, of guaranteeing the free flow of commerce; it impedes commerce in and out of the Reservation, of New Mexico, and of the several states. It would be ironic, and indeed inexplicable, to find after two centuries of adjudication that the most dependent yet least accountable entities under the Constitution are free to ignore the constitutional restraints that bind states, counties, and municipalities; and that Indian tribes may impose and multiply

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[52] In *Japan Line, Ltd.* the Court noted that a proper apportionment by California would not relieve the taxpayer of the risk of multiple burden, since the taxpayer's home country, Japan, would be free to follow the international custom of assessing an identical property tax on the *full value* of all the taxpayer's cargo containers found throughout the globe. The combined result of the California and Japanese assessments would be taxation at more than full value. Because the Court could not require the Japanese authorities to apportion their tax, it invalidated in entirety the California tax. It did so merely on the basis of the *risk* of multiple burden, without any demonstration of actual multiple burden.

In the instant case it is possible for Congress, acting pursuant to the Supremacy Clause, to apportion the tax benefit between the Tribe and New Mexico and thereby preclude the possibility of multiple burden to the taxpayer. Petitioners contend that Congress already made precisely such an apportionment when it entrusted all power to tax the Reservation's oil and gas production to the state, and all rights to the royalty portion to the Tribe. (*See* pp. 16-23, *supra*).

burdens upon commerce with the rest of the nation. It is respectfully submitted that the Constitution does not permit the Jicarilla Tribe to cause those results, and that the Severance Ordinance violates the Commerce Clause.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be reversed with directions to enter an order affirming the judgment of the District Court for the District of New Mexico.

Respectfully submitted,

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APPENDIX

Constitutional Provision, Treaty, Statutes, Ordinances and Executive Orders Involved

1. Constitutional Provision

United States Constitution, Article I, Section 8, Clause 3:

> The Congress shall have Power . . .
>
> To regulate Commerce . . . among the several States, and with the Indian Tribes; . .

2. Treaty Provisions

Articles 8, 9 and 11, ¶ 1, of the Treaty of Guadalupe Hidalgo Between the United States and Mexico, February 2, 1848, 9 Stat. 922:

> ARTICLE VIII
>
> RIGHTS OF MEXICANS ESTABLISHED IN TERRITORIES CEDED TO UNITED STATES
>
> Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever.
>
> Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without

having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

ARTICLE IX

HOW MEXICANS REMAINING IN CEDED TERRITORIES MAY BECOME CITIZENS OF THE UNITED STATES

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE XI

SUPPRESSION OF SAVAGE INDIAN RAIDS INTO MEXICO; PURCHASE OF CAPTIVES OR STOLEN PROPERTY PROHIBITED; RETURN OF CAPTIVES TO MEXICO *

Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

* * * *

3. Statutes

Act of March 3, 1927, 25 U.S.C. § 398a-e (1976):

§ 398a. Leases of unallotted lands for oil and gas mining purposes within Executive order Indian reservations

Unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any

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* The obligations of the United States under Article XI were released by Article II of the Gadsden Treaty Between the United States and Mexico, December 30, 1853, 10 Stat. 1031.

Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in section 398 of this title.

(Mar. 3, 1927, ch. 299, § 1, 44 Stat. 1347.)

§ 398b. Proceeds from rentals, royalties, and bonuses; disposition

The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided*, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress.

(Mar. 3, 1927, ch. 299, § 2, 44 Stat. 1347.)

§ 398c. Taxes

Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided*, That such

taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

(Mar. 3, 1927, ch. 299, § 3, 44 Stat. 1347.)

§ 398d. Changes in boundaries of Executive order reservations

Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress.

(Mar. 3, 1927, ch. 299, § 4, 44 Stat. 1347; Oct. 21, 1976, Pub. L. 94-579, title VII, § 704(a), 90 Stat. 2792.)

AMENDMENTS

1976—Pub. L. 94-579 struck out the proviso relating to nonapplicability of provisions to temporary withdrawals by the Secretary of the Interior.

EFFECTIVE DATE OF 1976 AMENDMENT

Section 704(a) of Pub. L. 94-579 provided in part that this section is amended effective on and after Oct. 21, 1976.

SAVINGS PROVISIONS

Amendment by Pub. L. 94-579 not to be construed as terminating any valid lease, permit, patent, etc., existing on Oct. 21, 1976, see Savings Provisions note under section 1701 of Title 43, Public Lands.

§ 398e. Applications for permits to prospect for oil and gas filed under other statutes; disposition

The Secretary of the Interior is authorized, under such rules and regulations as he may prescribe, to allow any person who prior to May 27, 1924, filed an application for a permit in accordance with the provisions of the Act of February 25, 1920, to pros-

pect for oil and gas upon lands within an Indian reservation or withdrawal created by Executive order who shall show to the satisfaction of the Secretary of the Interior that he, or the party with whom he has contracted, has done prior to January 1, 1926, any or all of the following things, to wit, expended money or labor in geologically surveying the lands covered by such application, has built a road for the benefit of such lands, or has drilled or contributed toward the drilling of the geologic structure upon which such lands are located, or who in good faith has either filed a motion for reinstatement or rehearing; or performed any other act which in the judgment of the Secretary of the Interior entitles him to equitable relief, to prospect for a period of two years from March 3, 1927, or for such further time as the Secretary of the Interior may deem reasonable or necessary for the full exploration of the land described in his application under the terms and conditions therein set out, and a substantial contribution toward the drilling of the geologic structure thereon by such applicant for a permit thereon may be considered as prospecting under the provisions hereof; and upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil and gas have been discovered within the limits of the land embraced in any such application, he shall be entitled to a lease for one-fourth of the land embraced in the application: *Provided*, That the applicant shall be granted a lease for as much as one hundred and sixty acres of said lands if there be that number of acres within the application. The area to be selected by the applicant shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public land surveyed; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in

accordance with rules and regulations to be prescribed by the Secretary of the Interior, and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys; deposit made to cover expense of surveys shall be deemed appropriated for that purpose, and any excess deposits may be repaid to the person or persons making such deposit or their legal representatives. Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre, the rental paid for any one year to be credited against the royalties as they may accrue for that year, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior. The applicant shall also be entitled to a preference right to a lease for the remainder of the land in his application at a royalty of not less than 12½ per centum in amount or value of the production, the royalty to be determined by competitive bidding or fixed by such other methods as the Secretary of the Interior may by regulations prescribe: *Provided further*, That the Secretary of the Interior shall have the right to reject any or all bids.

(Mar. 3, 1927, ch. 299, § 5, 44 Stat. 1347.)

Sections 16 and 17 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§ 476, 477 (1976):

§ 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult mem-

bers of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(June 18, 1934, ch. 576, § 16, 48 Stat. 987.)

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of

the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by ness, not inconsistent with law; but no authority Act of Congress.

(June 18, 1934, ch. 576, § 17, 48 Stat. 988.)

Sections 1 through 7 of the General Leasing Act of May 11, 1938, as amended, 25 U.S.C. §§ 396a-f (1976):

§ 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

(May 11, 1938, ch. 198, § 1, 52 Stat. 347.)

Historical Note

Repeals. Section 7 of Act May 11, 1938, provided as follows:

"All [Acts] or parts of Acts inconsistent herewith are hereby repealed."

§ 396b. Public auction of oil and gas leases; requirements

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided*, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title.

(May 11, 1938, ch. 198, § 2, 52 Stat. 347.)

§ 396c. Lessees of restricted lands to furnish bonds for performance

On and after May 11, 1938, lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of

the Interior, guaranteeing compliance with the terms of their leases: *Provided*, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

(May 11, 1938, ch. 198, § 3, 52 Stat. 348.)

§ 396d. Rules and regulations governing operations; limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

(May 11, 1938, ch. 198, § 4, 52 Stat. 348.)

§ 396e. Officials authorized to approve leases

The Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

(May 11, 1938, ch. 198, § 5, 52 Stat. 348.)

§ 396f. Lands excepted from leasing provisions

Sections 396a, 396b, 396c, and 396d of this title shall not apply to the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

(May 11, 1938, ch. 198, § 6, 52 Stat. 348; May 27, 1955, ch. 106, § 2, 69 Stat. 68.)

4. Ordinances, etc.

Article XI, Section 1, ¶¶ (a) (3) and (e) of the Revised Constitution of the Jicarilla Apache Tribe:

ARTICLE XI—
POWERS OF THE TRIBAL COUNCIL

Section 1. The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution.

(a) Management of tribal lands and natural resources:

* * * *

3. Resource Development. Tribal lands and natural resources may be developed for industrial or other purposes providing that such development is based upon sustained yield principles wherever applicable and provided that such development is designed for the general welfare of the tribe as a whole. The tribal

council may enact ordinances to govern the development of tribal lands and other resources.

* * * *

(e) Taxes and fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

JICARILLA APACHE TRIBE

ORDINANCE OF THE TRIBAL COUNCIL

OIL AND GAS SEVERANCE TAX

Ordinance No. 77-0-02
as amended by Ordinance No. 77-0-195

WHEREAS, under the Constitution of the Jicarilla Apache Tribe, the Tribal Council may impose taxes and fees upon persons and corporations doing business on the Reservation, including non-members of the Tribe; and

WHEREAS, under the Constitution of the Tribe, the Tribal Council has the authority and the obligation to govern the development of Tribal lands and other resources, and to develop such resources on sustained yield principles for the general welfare of the Tribe as a whole; and

WHEREAS, the Tribe has substantial reserves of oil and natural gas, which have been extracted from Tribal lands and exported from the Reservation, as a result of which the Tribe's resources are being rapidly depleted; and

WHEREAS, the only means by which the Tribe can establish adequate reserve funds to provide for the general welfare of the Tribe after depletion of its oil and gas is to impose a severance tax on oil and gas production.

NOW, THEREFORE, BE IT RESOLVED: That effective on the date set forth hereinafter, a severance tax is imposed on any oil and natural gas severed, saved and removed from Tribal lands, as follows:

1. *Due Date of Tax*

Such taxes shall become due at the time of severance and payable monthly as herein provided.

2. *Rate of Tax—Gas*

The severance tax set forth herein shall be at the rate of $0.5 per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

3. *Rate of Tax—Oil*

The severance tax set forth herein shall be at the rate of $0.29 per barrel of crude oil or condensate as measured under the terms of this Ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

4. *Exemption*

Royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe shall be exempt from taxation.

5. *Payment of Tax by Whom*

The operator of each well shall be liable for payment of the taxes assessed by this Ordinance and shall make payments pursuant to the terms hereof.

6. *Production Reports and Payments*

Within 45 days following the end of each calendar month, each operator of a well shall, in the statutory form and manner provided herein, make a return to the Tribe showing its total volume of oil, gas and condensate and BTU of gas produced from each well on Tribal lands for said calendar month and the amount of tax due. All taxes due or to be remitted by the operator shall accompany the return. Any additional report or information the Treasurer of the Tribe may deem necessary for the proper administration of the severance tax may also be required.

7. *Measurement of Gas*

The determination of volume, specific gravity and heating value of gas (BTU content) on which tax shall be paid shall be as set forth in the contract in force between the lessee or operator of the wells on which the tax is payable, and the purchaser of such gas, as reported by the operator or producer to the U.S. Geological Survey. Measurements of volume and heating value shall be in accordance with standard industry practices.

8. *Measurement of Crude Oil*

Crude oil subject to tax shall be measured in accordance with current contracts of sale by the operator or producer and the purchaser of such oil and in accordance with standard industry practices.

9. *Severance Tax Fund Created*

There is created an Oil and Gas Severance Tax Fund, Jicarilla Apache Tribe. All monies received shall be held in suspense by the Treasurer of the Tribe in such fund until disbursed as hereinafter provided. The Treasurer of the Tribe may execute vouchers against this fund

to make refund adjustments, payments of interest or payments for any purpose which this Ordinance may require.

10. *Reports by Treasurer, Transfer of Funds, Administration*

The Treasurer of the Tribe shall prepare a report to the Tribal Council of the Tribe semi-annually, as of June 30th and December 31st of each year, showing the amount of money collected and deposited in the Oil and Gas Severance Tax Fund, and such other information as is deemed necessary to determine the amount of money in the fund which is unencumbered. The Treasurer shall deduct from the unencumbered amount 5% of such amount for administration of this Ordinance.

Said reports shall be submitted to the Tribal Council within 90 days of the end of each reporting period. Within 30 days of the approval by the Tribal Council of said reports, the Treasurer of the Tribe shall transfer from the Oil and Gas Severance Tax Fund to the Oil and Gas Permanent Fund created by Tribal Ordinance No. 77-0-01, the amount of money which is reported to be unencumbered less 5% as above provided for administration of this Ordinance.

A Tax Administration Division is hereby established in the Treasurer's office, responsible to the Treasurer of the Tribe and the Tribal Council, with such personnel as shall be recommended by the Treasurer and approved by the Council. Expenses of said division shall be paid out of the 5% administration fund above established, as budgeted by the Tribal Council. Funds not expended or committed at the end of each fiscal year shall revert to the general fund of the Tribe.

11. *Tax Refunds*

Any person paying any tax erroneously may apply for a refund within 30 days from the date of payment of tax to the Treasurer of the Tribe, and the Treasurer shall have the authority and duty with the concurrence of the Natural Resources Committee of the Tribal Council to refund such tax if found to be erroneously paid. Any refund may, in the discretion of the Natural Resources Committee of the Tribe, be in the form of credit against future tax payments.

12. *Taxes May be Paid Under Protest*

A person paying such tax may pay such tax under protest by filing a notice of protest with the Treasurer of the Tribe at the time of payment. The protest shall be referred to the Natural Resources Committee of the Tribe by the Treasurer, as to whether the protested tax shall be refunded and a report shall be made to the Tribal Council within 45 days after the payment of the protested tax recommending disposition of said protest. The Tribal Council shall make a final decision as to the refund of said tax. If any tax shall be found to be erroneously or illegally collected, interest at the rate of 4% per annum shall be allowed on the amount erroneously or illegally collected. In the event the Tribal Council of the Tribe decides adversely to the protestant, the protestant may take whatever legal action is appropriate under the laws of the United States. Any amount of tax not paid when due shall bear 1% interest per month or a fraction thereof until paid.

13. *Consent to Suit*

For purposes of enforcement under §§ 11 or 12 hereof, the Jicarilla Apache Tribe consents to be sued either in the United States District Court for the District of New Mexico or in the Jicarilla Apache Tribal Court. The

Tribe does not consent to be sued in the state courts of New Mexico.

14. *Severability*

If any part or application of this Ordinance is held invalid, the remainder of the Ordinance or its application to other situations or persons shall not be affected.

15. *Effective Date*

The effective date of this Ordinance shall be the first of the fourth month following the approval of this Ordinance by the Tribal Council of the Tribe and the Secretary of the Interior or his authorized representative.

Adopted by the Tribal Council July 9, 1976

Approved by the Secretary of the Interior December 23, 1976

April 23, 1977

THE JICARILLA APACHE TRIBE

[SEAL]

TO: ALL OIL AND GAS LESSEES, OPERATORS AND PURCHASING COMPANIES DOING BUSINESS ON THE JICARILLA APACHE RESERVATION

Enclosed is a copy of the Oil and Gas Severance Tax Ordinance No. 77-0-02 enacted by the Tribal Council of the Jicarilla Apache Tribe on July 9, 1976 and approved on behalf of the Secretary of the Interior December 22, 1976.

The Oil and Gas Severance Tax Ordinance levies a severance tax of 5¢ per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the reservation, and a severance tax of 29¢ per barrel of crude oil or condensate, as measured under the terms of the ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the reservation.

The effective date of the severance tax is the first day of the fourth month following the approval of the ordinance by the Tribal Council and the Secretary of the Interior or his authorized representative. The effective date of the tax is April 1, 1977, and initial Operator's Report Remittance forms are due in the Accounting Office of the Tribe for the month of April, 1977, within 45 days after April 30, 1977. Initial tax remittances are also due at that time.

Enclosed for your reference is the Operator's Remittance Report form to be used in reporting taxes remitted. Instructions for completion of the report are printed on the back of the report.

Thank you for your cooperation.

JICARILLA APACHE TRIBE

5. Executive Orders

Executive Orders Pertaining to the Jicarilla Apache Reservation:

Jicarilla Apache Reserve.

[Pueblo Agency; area, 447½ square miles.]

EXECUTIVE MANSION, *March 25, 1874.*

It is hereby ordered that the following-described tract of country in the Territory of New Mexico, set apart as a reservation for the Jicarilla Apache Indians by the first article of an agreement concluded with the said Indians December 10, 1873, subject to the action of Congress, be, and the same is hereby, withdrawn from sale and settlement, viz: Commencing at a point where the headwaters of the San Juan River crosses the southern boundary of the Territory of Colorado, following the course of said river until it intersects the eastern boundary of the Navajo Reservation; thence due north along said eastern boundary of the Navajo Reservation to where it intersects the southern boundary line of the Territory of Colorado; thence due east along the said southern boundary of the Territory of Colorado to the place of beginning.

U. S. GRANT.

EXECUTIVE MANSION, *July 18, 1876.*

It is hereby ordered that the order of March 25, 1874, setting apart the following-described lands in the Territory of New Mexico as a reservation for the Jicarilla Apache Indians, viz: "Commencing at a point where the headwaters of San Juan River crosses the southern boundary of the Territory of

Colorado, following the course of said river until it intersects the eastern boundary of the Navajo Reservation; thence due north along said eastern boundary of the Navajo Reservation to where it intersects the southern boundary line of the Territory of Colorado; thence due east along the said southern boundary of the Territory of Colorado, to the place of beginning," be, and the same is hereby, canceled, and said lands are restored to the public domain.

U. S. GRANT.

EXECUTIVE MANSION, *September 21, 1880.*

It is hereby ordered that the tract of country in the Territory of New Mexico, lying within the following-described boundaries, viz: Beginning at the southwest corner of the Mexican grant known as the "Tierra Amarilla grant," as surveyed by Sawyer and McBroom in July, 1876; and extending thence north with the western boundary of said survey of the Tierra Amarilla grant to the boundary line between New Mexico and Colorado; thence west along said boundary line 16 miles; thence south to a point due west from the aforesaid southwest corner of the Tierra Amarilla grant; and thence east to the place of beginning, be, and the same is hereby, withheld from entry and settlement as public lands, and that the same be set apart as a reservation for the Jicarilla Apache Indians.

R. B. HAYES.

EXECUTIVE MANSION, *May 15, 1884.*

It is hereby ordered that the tract of country in the Territory of New Mexico set apart as a reser-

vation for the Jicarilla Apache Indians by Executive order dated September 21, 1880, be, and the same hereby is, restored to the public domain.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *February 11, 1887.*

It is hereby ordered that all that portion of the public domain in the Territory of New Mexico which, when surveyed, will be embraced in the following townships, viz:

27, 28, 29, and 30 north, ranges 1 east, and 1, 2, and 3 west; 31 and 32 north, ranges 2 west and 3 west, and the south half of township 31 north, range 1 west, be, and the same is hereby, set apart as a reservation for the use and occupation of the Jicarilla Apache Indians: *Provided,* That this order shall not be so construed as to deprive any bona fide settler of any valid rights he may have acquired under the law of the United States providing for the disposition of the public domain.

GROVER CLEVELAND.

It is hereby ordered that the following-described lands in New Mexico, viz: Beginning at the northeast corner of T. 26 N., R. 4 W.; thence east along the township line between Tps. 26 and 27 N. to the northwest corner of T. 26 N., R. 5 W.; thence due south to the southwest corner of T. 22 N., R. 5 W.; thence east on the township line between Tps. 21 and 22 N. to the southeast corner of T. 22 N., R. 1 W.; thence north to the northeast corner of T. 23 N., R. 2 W.; thence west to the southeast corner of T. 24 N., R. 4 W.; thence north to the southeast corner of

T. 26 N., R. 4 W.; thence east to the southeast corner of T. 26 N., R. 3 W.; thence north to the southeast corner of T. 27 N., R. 3 W.; thence east along the southern boundary of the present Jicarilla Indian Reservation to the range line between Rs. 1 and 2 W., in T. 27 N., be,

and the same are hereby, withdrawn from sale and settlement, and set apart for Indian purposes, for the use of the Indians of the Jicarilla Indian Reservation: *Provided*, That this withdrawal shall not affect any existing valid rights of any party.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *November 11, 1907.*
(711.)

Whereas it is found that Executive order of November 11, 1907, setting apart certain lands for the use of the Indians of the Jicarilla Indian Reservation, N. Mex., conflicts in part with Executive order of November 9, 1907, setting apart certain lands as an addition to the Navajo Indian Reservation, N. Mex., said Executive order is hereby so amended that the description of the tract of land thereby set apart for the purpose named therein shall read as follows:

Beginning at a point on the south boundary of the Jicarilla Indian Reservation on the range line between Tps. 26 and 27 N., Rs. 2 and 3 W., New Mexico principal meridian; thence west on said boundary to the southwest corner of the reservation; thence continuing west on the township line between Tps. 26 and 27 N. to the northwest corner of T. 26 N., R. 5 W.; thence east along the township line between Tps. 21 and 22 N. to the northeast corner of T. 21 N., R. 4 W.; thence

continuing east over unsurveyed lands along what would be, if established, the township line between Tps. 21 and 22 N. to what would be, if established, the southeast corner of T. 22 N., R. 2 W.; thence north over unsurveyed lands to what will be when established the northeast corner of T. 23 N., R. 2 W.; thence west over unsurveyed lands along what would be, if established, the township line between Tps. 23 and 24 N. to what would be, if established, the southeast corner of T. 24 N., R. 4 W.; thence north over unsurveyed lands to the southeast corner of T. 25 N., R. 4 W.; thence continuing north along the east line of T. 25 N., R. 4 W., to the southeast corner of T. 26 N., R. 4 W.; thence east over unsurveyed lands along what would be, if established, the township line between Tps. 25 and 26 N. to what would be, if established, the southeast corner of T. 26 N., R. 3 W.; thence north to the place of beginning.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *January 28, 1908.*
(No. 743.)

NEW MEXICO.

CARSON NATIONAL FOREST, N. MEX.

Under authority of the act of Congress of June 4, 1897 (30 Stat., 11 at 34 and 36), and upon recommendation of the Secretary of Agriculture, it is hereby ordered that on and after March 1, 1912, the boundaries of the Carson National Forest, N. Mex., as proclaimed March 2, 1909, and modified by subsequent proclamation of August 24, 1910, be further modified by excluding therefrom all that part of the Jicarilla Apache Indian Reservation included in the said Carson National Forest by the said proclamation of March 2, 1909.

The purpose of this exclusion is to restore the Jicarilla Apache Indian Reservation in all respects to the status existing prior to the said proclamation of March 2, 1909, as though the inclusion of the lands within the Carson National Forest had not been ordered, and said Indian reservation is hereby fully recreated and restored to that status.

WM. H. TAFT.

THE WHITE HOUSE, *February 17, 1912.*
(No. 1476.)

[Source: Kappler, *Indian Affairs and Treaties*, Senate Committee on Indian Affairs, Washington 1913]